Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In The Matter Of	)	
	)	
Children's Television Obligations	)	MM Docket No. 00-167
of Digital Television Broadcasters	)	

COMMENTS IN SUPPORT OF PETITION FOR RECONSIDERATION

Toy Industry Association

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TABLE OF CONTENTS

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Summary

The Toy Industry Association (TIA) respectfully urges the Federal Communications Commission (FCC) to grant the petitions for reconsideration in the Matter of Children's Television Obligations of Digital Television Broadcasters (MM Docket No. 00-167). Petitioners have raised important points of constitutional law, administrative procedure, and public policy that merit a thorough review. TIA members who, as advertisers, support children's educational and informational programming, as well as children's entertainment programming, will be harmed if the rule goes into effect. In particular:

- The redefinition of "commercial time" will either reduce advertising time available to TIA members, thus increasing costs, or result in less information about children's programs, potentially reducing awareness among child audiences of programming that is suitable for children and resulting in an overall loss of viewership.
- The 10% rule will force broadcasters simply to move programs to less desirable time slots to avoid conflicts with popular sports and other seasonal offerings, potentially resulting again in diminished advertising support and ultimately harming children's television programming objectives.
- The Commission's effort to regulate the display of passive website addresses which do not meet rather vaguely defined criteria, and to bar the display of website addresses when the site uses characters to promote

products or services, exceeds the scope of the Commission's authority and would be infirm under the First Amendment. Strict scrutiny would be required in light of the highly protected constitutional status of the Internet.

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To: The Commission

COMMENTS IN SUPPORT OF PETITION FOR RECONSIDERATION ON THE CHILDREN'S TELEVISION OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS

The Toy Industry Association (TIA) welcomes the opportunity to comment in support of the petitions for reconsideration in the Matter of Children's Television Obligations of Digital Television Broadcasters (MM Docket No. 00-167)[1] filed by the major advertising associations (American Advertising Federation, American Association of Advertising Agencies, Association of National Advertisers, Inc.); the National Association of Broadcasters; the Walt Disney Company; NBC Telemundo License Company; WB Television Network; Turner Broadcasting; Cox Broadcasting; Fox Entertainment Group; Univision Communications; 4Kids Entertainment, and others cited below. TIA respectfully urges the Federal Communications Commission (FCC or "the Commission") to grant the requested review. In so doing,

[1] *Children's Television Obligations of Digital Television Broadcasters,* 19 FCC Rcd. 22943 (2004) (hereafter "Report and Order" or "R&O"), *recon. granted in part*, FCC 05-22 (released Jan. 31, 2005).

the Commission should carefully consider the impact of these rules on advertisers and bear in mind the important role of advertisers in supporting children's television programming.

TIA is the national association representing U.S. producers and importers of toys, games and children's entertainment products. Its 300-plus members account for 85 percent of industry sales. TIA members advertise their products and services on both broadcast and cable stations; virtually all also operate their own websites where they may offer games, entertainment features, product information, as well as links to stores where adults can purchase products.

TIA supports the petitions for reconsideration for the following reasons:

1. The Commission improperly redefined "commercial matter" to include program promotions other than those for children's educational and informational (E/I) programming. This decision contravenes the FCC's statutory authority and First Amendment principles. The result will be that TIA members will face reduced available advertising time and/or increased advertising costs as a result. The Commission failed to consider this impact. It also failed to consider the extent to which support by advertisers is essential to the development of children's television programming, and how the realities of today's media environment factor into children's television viewing choices.

2. The 10 percent preemption rule could force broadcasters to move children's programs to new and less popular time slots, decreasing audiences. This

could mean less support from advertisers and thereby adversely affect broadcasters' ability to fund children's programs.

3. The Commission erred in adopting rules governing website references in programming and Internet host-selling. The Commission's authority to address certain commercial practices is limited by statute and by the First Amendment. The FCC's rules limiting the ability to display passive website links were adopted in violation of the Administrative Procedures Act. Moreover, the FCC rules would impose new regulations on the Internet, a medium the courts have determined should be accorded the highest level of First Amendment protection, and a medium over which the FCC lacks jurisdiction.

Advertising is the engine by which broadcast programs, whether educational and informational and/or purely entertaining, are made available to viewers. TIA shares the concerns of the petitioners that good children's programs of all types will be reduced or in some way compromised if the new rules are permitted to go into effect as written.

I. The Commission Has Improperly Redefined Commercial Matter

As pointed out by nearly all petitioners, the Commission's decision to redefine what constitutes "commercial matter" to include all program promotions (even when they contain no product or sponsor mentions), with the exception of promotions for educational and informational programming (E/I), contradicts the Children's Television Act (CTA)[2] and its legislative history. The legislative history makes it

[2] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. §§ 303a, 303b, and 394.

clear that program promotions are exempt. Indeed, the Commission in 1991 carefully defined commercial matter as "*air time sold for purposes of selling a product,*" establishing that commercial matter excludes program promotions. [3]

It is of significant concern that the FCC has altered this definition, which is central not only to broadcasters and cablecasters, but to purchasers of advertising time such as TIA members as well. It is of even greater concern that the FCC has done so without prior notice of the impending change or an opportunity for comment as required by the Administrative Procedures Act (APA).[4] In particular, the FCC has failed to explain what objective facts exist to justify the departure from the current policy.[5] The Commission merely asserts, without any factual justification, that its decision to include non-E/I program announcements is based on "over-commercialization." Advertisers face a hard cap on the total amount of advertising time for sale on children's programs. [6] The Commission's broad, generalized statement does not establish a reasoned basis for a sea change in policy, nor does it comply with constitutional standards. To the extent the objective is to limit the number of program "interruptions" more specifically, the Commission fails to explain how this rule would be effective given the favored status of program

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[3] *See* Petition for Reconsideration of WB Television Network at p.3; Petition for Reconsideration of NBC Telemundo at p.1.

[4] 5 U.S.C. Section 553(b) (2000).

[5] *See* Petition for Reconsideration of the American Advertising Federation *et al.*, p. 6; Petition for Reconsideration of the Walt Disney Company, p.5.

[6] The Commission has not altered the commercial time limits adopted in the CTA in this rule. In point of fact, the FCC has the ability to initiate enforcement actions where commercial matter exceeds the limits of the CTA. Indeed, the Commission has recently brought enforcement actions for violations of these limits. *See* Order, *International Family Entertainment, Inc.*, 19 FCC Rcd. 20789 (2004); Order, *Viacom International, Inc.*, 19 FCC Rcd. 20802 (2004).

promotions for E/I programs, which are exempt from the rule that they be counted towards the commercial limit despite the fact that they, too, constitute a program interruption.

The Commission's failure to show how the rule change will advance its stated goals renders the revision of the "commercial matter" definition arbitrary and capricious under the APA, exceeds the FCC's statutory authority under the CTA,[7] and is constitutionally suspect. As pointed out by the American Advertising Federation *et al.*, the Commission has failed to develop any record at all to justify this further restriction on speech.[8] The advertising association petitioners and others have outlined in detail the constitutional deficiencies of the Commission's approach. The FCC's answer to Constitutional critics, that the restriction passes the Central Hudson test, is doubtful, at best, even assuming that it correctly categorizes program announcements as "commercial matter."

As a practical matter, counting program promotional announcements for non-E/I programs as commercial matter can only harm the goal of the production, airing and viewing of good quality advertiser-supported children's programming. TIA agrees with 4Kids Entertainment, the advertising associations, and others that broadcasters need to rely upon advertisers to produce quality programs that children will enjoy and watch. Nielsen ratings data submitted by 4Kids, for example, show that broadcasters need to televise and promote children's non-E/I

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[7] *See, e.g.*, Petition for Reconsideration of WL Television at p.6.

[8] *See* American Advertising Federation *et al.*, pp.9-10

programming to bring kids into the audience for core programming.[9] Application of this rule could force broadcasters to reduce their commitment to children's programming other than core programming,[10] which could further limit the amount of advertising time available to companies like TIA members seeking to reach the parents and children who watch these shows, making fewer resources available for children's programs. Younger children in particular are less likely to consult written program guides for information on programs, and may simply turn away from television, or watch programs intended for older audiences.

Children are already using many other types of media. A recently issued Kaiser Family Foundation study, *Generation M: Media in the Lives of 8-18 Year Olds*, reports that children 8 – 18 spend 6 ½ hours a day using media (TV, audio, computers, etc.), but through the phenomenon known as multi-tasking are exposed to more than 8 ½ hours per day of media messages.[11] This means that children are often using media not necessarily intended for children. These figures are supported by Nielsen ratings for Saturday morning network television shows for children between 2002 and 2004, which show a decline of 26 percent.[12] While ratings for core E/I programs remain low, the top-rated shows for children 6 through 14 were programs geared for more mature audiences, a point not addressed at all by the Commission.[13]

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[9] *See* Petition for Reconsideration of 4Kids, p.5.

[10] *Id* at p.4.

[11] *Generation M: Media in the Lives of 8-18 Year Olds*, Kaiser Family Foundation, March 2005, p 57.

[12] *See* Petition for Reconsideration of 4Kids Entertainment at p.11.

[13] *Id* at p.8.

The Kaiser Family Foundation report notes in this regard:

> Situation comedy is the preferred type of TV program among young people, regardless of demographic characteristics…Indeed, comedy is the only program genre that consistently attracts a third or more of young viewers regardless of age, gender, race or socioeconomic status.[14]

The Report examines the viewing habits of children 8 – 18 overall, and separately analyzes trends in three separate age categories: kids 8 – 10; tweens/young teens 11 - 14; and older teens 15 – 18. Viewing varies somewhat by age. Thus, while 37% of kids and teens aged 8 – 18 watch situation comedies, younger children report a *higher* percentage of viewing such shows: 39% of children in the 8 – 10 year old age bracket, 36% of teens/tweens 11 – 14, and 34% of older teens 15 – 18 watch sitcoms. Viewership of educational and entertainment programming is highest for children 8 – 10 (47% reported watching educational programs and 45% reported watching other children's programs), but drops sharply in the older age brackets. Just 21% of tweens 11-14 watch educational children's shows; 22% of tweens watch other children's shows. A significant number of kids 8 – 18 also watch movies, reality shows, and the like, all providing competition for viewing of children's educational and entertainment fare.[15]

With 68% of children age 8 – 18 reporting having a TV in their bedroom (69% of children 8 – 10),[16] it appears that the "overcommercialization" discussed by the Commission is largely unrelated to commercial time on children's programs given the regulatory limits on the sale of commercial time. If children's programming

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[14] *Generation M: Media in the Lives of 8-18 Year Olds,* Kaiser Family Foundation, p.25.

[15] *Id* at pp. 25-26.

[16] *Id.* at p.13.

choices diminish as a result of the proposed new rules, today's "Generation M" children so adept at media multi-tasking will likely migrate further from advertiser-supported free television. From a constitutional standpoint, these facts call into question whether the rule directly advances the stated objective, and still more whether the Commission has considered less restrictive alternatives, particularly in light of the burdens the rule will impose.

II. The 10 Percent Rule Could Ultimately Reduce Viewership and Advertising Support

TIA agrees with Fox Entertainment Group that the Commission should take care not to impinge upon the First Amendment in seeking to impose rigid limitations on preemption of core educational and informational programming, lest it force broadcasters to move core programming to less attractive timeslots where advertisers will be reluctant to support it because audiences are likely to be significantly diminished. In its earlier statements on preemption, the FCC staff said stations could preempt programs on a case-by-case basis to meet certain live programming exigencies so long as they rescheduled and notified viewers of the changes. Numerous sporting events, popular with both children and adults, do conflict with the children's programming schedule for Saturdays, particularly on the West Coast.[17] Petitioners have noted that the legislative history of the CTA makes it clear that the FCC was neither required nor encouraged to adopt a quantification standard for preemption,[18] and the absence of any rationale for changing the

[17] *See* Petition for Reconsideration of Cox Broadcasting *et al.*, p.7.

[18] Petition for Reconsideration of Fox Broadcasting, p.2, citing to S. Rep. 227, 101st Cong 1989 at 23; HR 385,101st Cong 1989 at 17.

preemption rule violates the APA.[19] Fox Entertainment Group argues strongly for a return to the flexible and successful post-CTA policy, allowing the FCC staff to determine what level of preemption is allowable, or in the alternative for an amendment to the rule to accommodate to the realities of free over-the-air sports program broadcasting. TIA supports these approaches. Its advertiser members believe they would work much more successfully in assuring that children's television programming continues to receive the support it needs and deserves.

III. The Commission's Rules on Website References and Host-Selling Are Vague and Unenforceable, and Constitutionally Suspect

The Commission exceeded its statutory and constitutional authority in adopting rules governing website references in programming and the appearance of program characters on websites without developing the kind of record required by the APA and apparently without consideration of either constitutional or statutory limits on its ability to oversee Website content.[20] As a number of the petitioners pointed out, the Commission in its proposed rule sought comment only on television interactivity[21]; the final rule was expanded to cover and restrict the *mere display* of website addresses where there is no question of interactivity.

The new rule would limit the display of website materials during program material only to websites meeting the following four-part test: 1) the website offers *bona fide* program-related or other non-commercial content, 2) the website is not

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[19] Petition for Reconsideration of NAB, p.21.

[20] Petition for Reconsideration of Turner Broadcasting, pp.17-19; Petition for Reconsideration of Disney, pp.17-18.

[21] Turner Broadcasting p.14; Disney Company pp.17-19.

primarily intended for commercial purposes, 3) the website home page and menu pages clearly distinguish between commercial and non-commercial matter, and 4) the page to the website where viewers are directed is not used for e-commerce, advertising or other commercial purpose (*e.g.*, does not contain links to a store or to another page with commercial matter).[22] It is not apparent that the passive display of a website address, whether commercial or non-commercial, has any adverse impact upon a child, since a separate step, namely, going to a computer and affirmatively accessing the website, is required.[23]

Questions of its legal authority to regulate the content of any website aside, the Commission fails to provide any guidance on how this rule would be applied. When is a website not primarily intended for commercial purposes? What rules will the Commission apply to determine when the website home page and menu pages "clearly distinguish between commercial and non-commercial matter"? What is the basis for the "two-click" rule? How would the rule apply to programs recorded earlier? Based on these rules, for example, it is not clear whether a nature program could provide a link to the World Wildlife Fund's website, as the home page contains a link to a store, and it is unclear what a site must do to satisfy FCC's views on appropriately distinguishing "commercial" offerings.[24] The Commission is treading here on dangerous constitutional territory that enmeshes it in content determinations outside its statutory authority.

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[22] Report and Order at ¶ 50.

[23] *See* Petition for Reconsideration of Nickelodeon at p.20.

[24] *See* http://www.worldwildlife.org.

The Report and Order also adopts a ban on host-selling, which it states applies to website addresses "displayed both during program material and during commercial material."[25] However, Section 303a of the CTA does not confer on the Commission the authority to regulate the *content* of children's television programming or advertising, and says nothing whatever about websites.[26] In that context, application of the broadcast host-selling prohibition to the display of Internet website links applied to either programmers or advertisers is as onerous as it is legally unsupportable.[27] Not only does the Commission fail to define what it means by host-selling in the Internet context, it fails to outline the basis for this assertion of authority over advertiser websites in particular. The assertion of such jurisdiction is dubious at best on statutory grounds, and TIA agrees with the advertising associations that this aspect of the rule is clearly subject to a strict scrutiny standard under the First Amendment.[28]

Conclusion

TIA urges the FCC to consider the points made in nearly all the Petitions for Reconsideration and described above. Its membership is desirous of continuing their longstanding support of children's programming. This support will be made more difficult if, through this rule, available advertising time on children's programs will be artificially reduced and prices increased, or children are less able

[25] Report and Order at ¶ 51.

[26] Petition for Reconsideration of Turner, p.16.

[27] *See* Petition for Reconsideration of Univision Communications, pp.2-3.

[28] *See* Petition for Reconsideration of AAF *et al*, p. 17, citing *ACLU v. Johnson*, 194 F. 3d 1149, 1156 (10th Cir. 1999) and *Reno v. ACLU*, 521 U.S. 844, 870 (1977).

to find their way to free programs available on advertiser-sponsored broadcast television. TIA is equally concerned about the Commission's unprecedented effort to regulate the Internet. To this end, TIA asks that the rule's limits on promotional material for non E/I programming, on preemption and on website references and host-selling be reconsidered and rescinded.

Respectfully submitted:

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